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MEMORANDUM

December 8, 2005

TO: Board of Selectmen

FROM: Peter k. Ashton

SUBJ: Update on Towne School Building

cc: Don Johnson

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At our meeting Monday evening we will be discussing the status of the Towne Building and the affordable housing reuse possibility, and therefore this memorandum, gives the Board (including our new members who may not be familiar with this long saga) some background and history on where we've been and where we are today. Much of this memorandum is drawn from an earlier memo written by Nancy Tavernier. I have simply updated it for the last year and a half.

Municipal involvement with the Towne School Building began at the April 2001 Town Meeting when voters defeated a resolution put forth by the School Committee to demolish the Towne School as part of the construction for the new elementary school and use the land for educational purposes, presumably play space. After the resolution was defeated, the voters transferred the Towne School from the School Committee to the Town of Acton and provided \$90,000 to maintain the building until such time as a viable reuse could be determined. In May 2001, the Town was informed by the School Administration that the schools wanted to reserve their option to reuse the building after some period of time and did not want to see the building and land sold by the Town.

In May 2001, the ACHC was contacted by the Town Manager to determine whether an affordable housing option would be viable. ACHC contacted Mass. Housing Partnership seeking advice and was informed as early as June 2001 that this housing option could indeed be viable and was being done in other communities in the state. MHP offered the use of their technical services program. Discussions began with MHP which included meetings with ACHC, town staff and members of the BOS.

In June 2001, the School Committee commissioned a feasibility study for the Towne School property to determine what potential uses could be accommodated in the limited amount of space and land area within current zoning restrictions. A report was prepared and presented to the School Committee showing limitations to any reuse other than educational, primarily due to parking requirements. This report became the basis of a comprehensive review of all potential options for the property with a committee chaired by myself. Representatives from all the pertinent town boards were included on the committee.

After 6 months of exploring ideas and options, the Committee concluded that the affordable housing option was the only feasible option in light of the stipulation that no local tax dollars should be used to redevelop the property. In January 2002, the Selectmen voted unanimously to recommend the affordable housing reuse for the property. Within a week of that decision, a citizens' petition was circulated for signatures calling for a Special Town Meeting to vote to demolish the Towne Building. The petition was filed and the Town Meeting was called to take place within the Annual Town Meeting in April 2002.

The development of a conceptual plan for the building had to be accelerated in order to present a cogent argument to the Town Meeting on the viability of the reuse. MHP agreed to fund the feasibility study and contracted with a consultant who was put on a fast track while he set aside his other jobs to concentrate on this study. Ed Marchant prepared the report and an architect prepared a conceptual design concluding that 18-20 units were feasible for the rental housing development.

At the Town Meeting on April 2, 2002, the petitioner presented her arguments in favor of demolition, I presented the BOS arguments against, and then Nancy Tavernier presented the affordable housing option urging voters to give the option a chance. The FinCom argued against the affordable housing option and for the demolition. After a couple of hours of excellent debate, the vote was taken. The petition to demolish the Towne Building was defeated by a vote of 342 YES to 467 NO. The vote required a two-thirds majority.

The next hurdle related to the land area surrounding the Towne Building which had to be delineated and agreed upon by the School Committee and the Board of Selectmen. Negotiations on this began in June 2002 and immediately hit a wall with 3 of the School Committee members opposed to giving anything but a bare minimum of land area surrounding the building. The entire summer was spent in negotiations and when the final vote (3-2) was taken in September 2002 the School Committee finally accepted the assignment of land large enough to hold most of the required vehicle parking for the 18-20 units and signed off on the proposed site plan. However, the trade-off was that in addition to the limited parking area, the development could have access only from Mass. Ave. and they could not use the parking areas of the schools

The draft RFP and long term lease, prepared by ACHC member Bob Whittlesey, was submitted to the Town Manager in September 2002 and referred on to Town Counsel. Immediately another obstacle was encountered. It was known that the Board of Selectmen needed Town Meeting authorization for any lease period greater than 10 years, the Towne Building lease terms were proposed to be for 50 years. The Selectmen were urged by ACHC to place a warrant article on the October Special Town Meeting to seek voter support for a 50 year lease.

However, in the process of reviewing the proposed warrant article Town Counsel ruled that the vote to authorize a long term lease had to be made via a Home Rule petition

through the Legislature and that Town Meeting should approve it with a two-thirds vote. The Selectmen presented the Home Rule Petition to the October 14, 2002 Special Town Meeting called for the purpose of approving the new Public Safety Facility. The petition was approved with a vote of 165 in favor and 3 against. The Petition then was sent to the Legislature and the petition was approved by the end of the session and signed into law January, 2003.

In February 2003, the ACHC was finally given specific feedback on the lease and RFP from Town Counsel, made the necessary revisions to the documents, and returned them to the Town Manager for final review, unfortunately getting mired in pre and post Town Meeting delays. In June 2003 notice was sent to the Central Register in anticipation of the RFP being put out to bid which occurred in July for an early August response deadline. Two developers submitted proposals for the reuse of the Towne Building as 18-20 rental, mixed-income units, both developers were experienced non-profit organizations in the business of creating affordable housing. They were Homeowners Rehab, Inc. and Women's Institute for Housing and Economic Development.

A selection committee was formed, the developers were interviewed in early September 2003, and the committee recommended Homeowners Rehab, Inc. (HRI) of Cambridge to be the developer of the Towne Building. The Board of Selectmen voted to approve the selection of HRI who was notified by the Town Manager that they had been awarded the project. No sooner had this decision been made when a red flag went up and the most difficult of all hurdles was placed in the path of the redevelopment of the Towne Building. This time it was not a local hurdle but a state one. During the summer of 2003, the town of Barnstable was putting together an RFP to develop town owned land for affordable housing using a private developer. The development would utilize a long term lease similar to Acton's. Barnstable has an excellent reputation for initiating creative affordable housing solutions. Their Town Manager decided to proactively run the idea past the Attorney General's office just to be sure there would be no statutory problems with what the town was proposing. He sent the AG a letter in July, requesting an answer by early August.

The answer did not come until October 2003, and it was a very strong caution to the town of Barnstable warning that the project may indeed be considered public construction, even though it was using a private developer, due to the fact that the Town still retained ownership of the land. MHP was also copied on the letter and realizing this affected many of their municipal clients, they sent the letter out to all of them, including Acton, suggesting that each community get a ruling and guidance from their own Town Counsel. The Town Manager immediately transmitted this AG letter to Palmer and Dodge along with the proposed long term lease, seeking an opinion. I think it is fair to say that Tom Schnorr of Palmer and Dodge was quite concerned about the message from the AG's office and he applied the brakes to the Towne Building proposal and everything came to a screeching halt in October 2003.

The problem with such developments being defined as public construction projects is that they then must adhere to all the public bid requirements, must pay prevailing wages, and must use a sub-bid system for every aspect of the construction. This is not something a non-profit developer does nor do we think they would be willing to, since it could increase the total project cost dramatically. The financing of these developments is very tight, leaving no room for such increased costs. What triggered this conundrum is the 50 year lease which allows ongoing Town ownership of the property. Seeking further review, there were a series of discussions between the Town and MHP, the Town and Palmer & Dodge, the Town and other towns, and between ACHC and an assortment of housing advocates during the winter and spring of 2003-2004.

In May 2004, Nancy wrote the Board suggesting that some action needed to be taken since the project was in limbo. It was decided first to go back to the School Committee and sound them out as to their willingness to change their view with regard to their request not to sell the land. Although no vote was taken, the sense of the School Committee was that there was little support for changing their position on the sale of the land. A formal meeting was then held on May 24, 2004 at Palmer & Dodge with the Town Manager, myself, Bob Whittlesey, representatives from Mass Housing Partnership, DHCD, and legal counsel. The purpose of the meeting was to explore possible strategies for moving the project forward or declaring it dead. During this period of time (and continuing to the present) HRI remained very interested, provided some action could be taken to mitigate the risk associated with the AG's letter regarding the Barnstable project. MHP made it clear that they believed that the AG was wrong in its Barnstable letter and that they, along with DHCD, were working to try to rectify the situation.

During the summer of 2004, Bob Whittlesey, through his contacts, confirmed that MHP and DHCD were working on trying to solve this problem as numerous other similar projects were also potentially at risk. The Board agreed to wait to see if any further progress could be made, particularly given that at this point we had spent less than half of the \$90,000 appropriated for maintenance of the building.

In October 2004, we were informed that DHCD was drafting a set of guidelines relating to the state bid laws and the leasing of municipally owned land as it related to affordable housing. Finally on November 30, 2004, DHCD released its guidelines indicating its views on how one could lease land and/or a building to a private developer for affordable housing without triggering the public bid laws. At the same time, DHCD requested that the AG comment on the guidelines. The AG responded on February 17, 2005 generally confirming that the guidelines "would not give a municipality the type of control over construction" that prior cases had held would trigger the public bid laws.

With this new guidance and views from DHCD and particularly the AG, it appeared that the project could go forward, although some minor modifications would be required to the lease. At this point, the ACHC requested that Steve Anderson be assigned the legal review task taking Palmer and Dodge out of the picture. Counsel subsequently restructured the lease so that it would conform to the guidance provided by the AG and DHCD (which were not in effect back in 2003 when the lease and RFP had been written).

Over the summer, we have negotiated with HRI over changes in certain provisions of the lease, and to try to mitigate or eliminate any concerns that they might have about going forward. Since this issue has not been litigated, there is still some risk that a challenge claiming that the construction bids laws would be implicated if HRI went forward continues to cause HRI some concern and as of now, they have expressed an unwillingness to sign the lease without some sharing of the risk with the Town.

At this point, I believe we have done all that we can to mitigate HRI's risk which frankly I believe to be very small. Several similar projects (affordable housing constructed by private developers on municipal-leased property) are underway and some have even been completed – perhaps the most noteworthy is a Westford low income rental housing project built by a private developer on Westford Housing Authority land conveyed to them by the Town as well as a similar project underway in Bedford. We cannot, however, allow this to drag on any further. Based on discussions with Town Counsel, the Town Manager, and representatives from the ACHC (Nancy and Bob), I would recommend to the Board the following course of action:

1. Authorize the Manager to go back to HRI and tell them either to accept the lease or we will allow them to withdraw without prejudice and reject their bid immediately;
2. Assuming, as I expect they will, that HRI does not agree to go forward, then I would recommend that we immediately put out a new RFP and lease that contains the appropriate language regarding the DHCD and AG guidelines.

I favor this course of action because at this point the lease is rewritten and the revisions in the RFP will take little effort. Putting out a new RFP will place everyone on a level playing field with good information about the issues regarding the public bid laws so that bidders can take this into full consideration in deciding whether to bid and whether the project is economic given the risks. This can be done quickly so that responses will be obtained before April so that by Town Meeting we will know if this is a viable reuse under the new circumstances as enunciated by the AG and DHCD. Bob seems to think that there are other possible interested bidders, HRI would not be precluded from bidding again, and I am aware of one who might be interested. If not, then we will be in a position to take action at Town Meeting such as to ask to return the building to the schools, to examine other reuse alternatives (and see if the town is willing to spend any money in such an endeavor), or (not my choice) ask permission to demolish the building.

I know this has been an extremely long saga. My involvement dates back to April 2001, and I would like nothing better than to say it is over and the affordable housing option does not work. However, I think we are the victims of bad timing in the sense that we issued the RFP and received bids just before the Barnstable letter, and since that time the issue has been greatly clarified which now makes this a potentially viable project again. However, since the RFP and lease were written prior to all of this history, it really

makes most sense to try again – affordable housing projects are now being built under these guidelines, and re-issuing the RFP and lease that explicitly consider these guidelines is the best way to determine whether a developer would be interested in the project. Further there do not seem to be any other viable options that meet the various constraints that have been placed on this property.